BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WINNEBAGO COUNTY
DEPARTMENT OF SOCIAL SERVICE EMPLOYEES,
LOCAL 2228, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES,
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES AFL-CIO**

and

WINNEBAGO COUNTY, WISCONSIN

Case 328
No. 59325
MA-11252

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, Wisconsin 54913, appearing on behalf of Winnebago County Department of Social Service Employees, Local 2228, Wisconsin of County and Municipal Employees, American Federation of State, County and Municipal Employees AFL-CIO, referred to below as the Union.

Mr. Tony J. Renning, Davis & Kuelthau S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of Winnebago County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Virginia Sherer. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on January 25, 2001, in Oshkosh, Wisconsin. A transcript of the hearing was filed with Commission on February 14, 2001. The parties filed briefs and reply briefs by April 16, 2001.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the County violate Articles 1, 8 and 9 of the Labor Agreement when it suspended Virginia Sherer for three days for not properly performing her duties as a Placement Coordinator and providing false information to others involved in this case?
>
> If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 1
MANAGEMENT RIGHTS

> Through its management, the employer retains the sole and exclusive right to manage its business, including but not limited to the right to . . . suspend . . . discharge or discipline for just cause . . . In no event shall the exercise of the above rights and responsibilities of the Employer violate the terms and conditions of this Agreement.

. . .

ARTICLE 8
DISCIPLINE AND DISCHARGE

> An employee may be suspended, discharged or otherwise disciplined for just cause. The sequence of disciplinary action shall be written reprimands, suspension and discharge. This sequence of discipline need not be followed in situations calling for immediate suspension or discharge.

. . .

ARTICLE 9
RULES, REGULATIONS AND POLICIES

> The Employer may establish and enforce rules in connection with the operation of the Social Services Department and the maintenance of discipline in said operation by the Employer.

> The Employer agrees to send a copy of said rules to the Union President for its information at least fifteen (15) days prior to the effective date of such rules. Such policies shall be subject to the grievance procedure.

BACKGROUND

The grievance form, filed on March 8, 2000 states the relevant circumstances thus:

> On the above date, employee was informed she would be suspended without pay for a period of three days, beginning March 1, 2000. This suspension followed an investigation into the J.G. matter. No written discipline was received until after employee's return to work on March 6, 2000.

As the appropriate remedy, the form seeks that the County "(r)estore pay lost as result of this suspension; remove any reference to the is discipline from any/all records; make employee whole."

Dennis D. Wendt, then Interim Director of the County's Department of Human Services (DHS), issued the reprimand letter of March 6, which states:

> The Winnebago County Department of Human Services had an investigation conducted by Godfrey & Kahn. You were given a written summary of the investigation completed by the agency and a written summary dated 2/23/00.
>
> In a meeting with you on Monday, February 28, we presented the investigation information regarding your activities to you for your review. We then held a second meeting with you to hear your response to the allegations set forth in the investigation.
>
> After considering the information from the investigation and the information that you expressed in a written memo and verbally in our meeting of February 28, I determined that in the case of JG you did not properly perform your duties as a placement coordinator with the Winnebago County Department of Human Services on the Child Welfare Resource Team. The information points out that you did not locate, recommend, and facilitate a legal-risk placement for a client as was needed for the case. Additionally, you provided false information to other individuals involved with this case.
>
> As a result of this misconduct, you are hereby suspended without pay for a period of three workdays . . .

> Please be advised that in the event that you engage in similar misconduct in the future, you may be subject to more severe disciplinary action up to and including discharge.

The events underlying this letter demand are complex, focusing on the response of DHS employees to the foster care arrangements of an infant referred to as JG.

The Administrative Structure of the Child Welfare Division of DHS

Leo Podoski is the Manager of the Child Welfare Division of DHS. Broadly speaking, this division provides services to children and juveniles, including home placement. The Child Protective Services Team/South (CPSS) is under Podoski's supervision. The CPSS team provides case management services to clients. The services range from assessing care needs to coordinating the provision of necessary services, including placements into foster homes. The care assessment process is designed to afford whatever service is necessary to keep a family unit intact. In cases in which biological parents cannot care for children with such services, it becomes the responsibility of the CPSS team to initiate a legal proceeding to terminate the parental rights of a parent or parents through the juvenile court process. This court process is referred to below as the TPR process. The CPSS team consists of a Team Supervisor, eight Social Workers and two Home Consultants. Chris Howe is the CPSS Team Supervisor. Robin Siebecker is a Social Worker on the CPSS team.

Also under Podoski's supervision is the Resource Team. The Resource Team recruits, trains and licenses foster homes. It also oversees the operation of foster homes, and can revoke the license of homes not meeting relevant standards. The team will accept referrals for placements from social workers, and is responsible for linking a referred client to an appropriate home. The Resource Team consists of one Supervisor, three Placement Coordinators, two Shelter Care Workers, two Electronic Monitoring Social Workers, one Corrections Worker and one Youth-at-risk Worker. Terri Wilkens is the Supervisor of the Resource Team. From March of 1999 through April of 2000, Rebecca Long served as an Electronic Monitoring Social Worker. Sherer, at all times relevant here, served as a Placement Coordinator for the Resource Team.

A foster home can be a receiving home or a legal risk preadoptive home. It is possible to serve both functions, and a single license covers both. From the client's point of view, a receiving home is a temporary shelter provided pending the provision of long-term care. A legal risk preadoptive home reflects that the shelter afforded may become permanent because the home provider has the interest, and potentially the opportunity, to adopt.

JG

JG was born in November of 1996. Her biological mother was arrested and jailed in Winnebago County in January of 1998. Her biological father had been incarcerated sometime prior to this, and had no established relationship with JG. In March of 1998, DHS placed JG in the Reagan Foster Home. In April of 1998, her mother was sentenced to ten years in prison. In May of 1998, JG was adjudicated a Child in Need of Protective Services (CHIPS), and legal custody over her was transferred to the County, through DHS. In August of 1998, JG's biological mother transferred to a prison in West Virginia. Siebecker prepared a Permanency Plan on JG's behalf and submitted it to the County Circuit Court on March 31, 1999. The plan stated as its "Permanency Plan Goal", the termination of JG's biological mother's and father's parental rights. Her biological father was released from prison in May of 1999. JG continued to live at the Reagan Foster Home until June 10, 1999.

DHS Policy 96-2

Policy 96-2 became effective on November 26, 1996, and reads thus:

> No employee of the Winnebago County Department of Social Services will be allowed to be a licensed/certified foster parent/adult family care provider, respite care provider, day care provider or guardian for children or adults who are serviced by the Winnebago County Department of Social Services.

DHS implemented Policy 96-2 to address a situation that arose in 1996 and involved Long, who was then employed as an Early Intervention Social Worker. Long was then a licensed as a Foster Parent through an agency other than DHS. She wanted to secure the placement of two children who were clients of DHS and who were eventually the subjects of a CHIPS and a TPR proceeding. These proceedings put the County in the position of advocating a result adverse to the children's biological parents that might permit Long, as a County employee, to secure legal custody of the children. The County determined this posed a conflict of interest, posing a series of adverse ramifications. As a matter of social work ethics, the personal interest of an employee servicing a child that the employee sought to adopt might conflict with those of the child or the child's biological parents. Beyond this, the conflict of interest could pose civil and potentially criminal liability issues for the County concerning actions adverse to the rights of the biological parents. The conflict of interest could undermine the successful advocacy of CHIPS or TPR proceedings, and opened DHS to the public perception that placement and custody decisions were slanted in favor of employees.

In response to this situation, the County contracted with another county to provide the case management duties concerning the children sought to be adopted by Long. This cost the County several thousand dollars. To preclude a recurrence of this type of situation, the County promulgated Policy 96-2.

The Development of the Controversy Concerning JG's Placement

As noted above, JG remained at the Reagan Foster Home until June 10, 1999. Due to concerns with the quality of care at the home, the County closed it. This necessitated another placement for JG. Sherer and Wilkens assessed the available options and determined the best available placement for JG was at the Fenrich Foster Home. Karen Fenrich operates the home, and has an established relationship with DHS. She has adopted children placed with her by the County. She is a friend of Long's, and offered her home to JG as a receiving home. She noted to Sherer that she hoped Long could adopt JG.

In July of 1999, Siebecker prepared a "Request for Termination of Parental Rights" on behalf of JG for submission to a County Circuit Court. Karen L. Seifert, an Assistant Corporation Counsel for the County, advocated the request in court. Among other points, the request noted that JG's biological father "has never established a relationship with his daughter." The request also noted that JG's biological mother "will be incarcerated until at least April 29, 2002." The request also stated that JG "is expected to be easily adoptable given her age and lack of special needs", adding that "she has an ability to form a bond with an adoptive family."

Long developed a relationship between herself and JG, which, by November of 1999, had become more akin to parent/child than to social worker/client. Sometime in November of 1999, Seifert learned of the relationship and informed the County's Corporation Counsel, John Bodnar. The relationship became one of a series of factors complicating the County's advocacy of a TPR concerning JG. Due to a program designed to ease prison overcrowding, JG's biological mother had become eligible for release well before April of 2002, and her advocate had made discovery requests for the production of County documentation supporting the TPR request.

Bodnar determined that the relationship between Long and JG created the appearance of a conflict of interest. Beyond this, County documentation supplied in response to the discovery request failed to note that Long hoped to adopt JG and had been permitted to develop a relationship with the child, possibly including overnight stays. Bodnar viewed the relationship to violate Policy 96-2, to taint the TPR request and to risk significant liability issues for the County. Ultimately, the County filed a motion to dismiss the TPR. On January 18, 2000, the Circuit Court granted the County's motion to dismiss. The County ultimately contracted with another county to provide case management over JG.

Bodnar discussed the matter with Podoski, indicating that DHS needed to investigate the matter fully, without regard to the disposition of the TPR.

The DHS Investigation

Because of the close working relationship between DHS and the Corporation Counsel's office, the County determined not to conduct the investigation "in-house." Podoski contacted Godfrey & Kahn, S.C., to conduct an investigation on the County's behalf. Podoski oversaw the investigation, which included the direct interview of ten individuals and the review of written statements from two State of Wisconsin employees. Sherer and Wilkens were among the individuals interviewed. Union representatives sat in on the interview of each unit employee.` The interviews took place in early February of 2000.

On February 28, 2000, Podoski summoned Sherer to a meeting and provided her with an unsigned memo, dated "2-23-00" which states:

> The following is information gathered and summarized, regarding the investigation into the JG child protective service case as it relates to Ginnie Sherer's involvement.
>
> In late May/early June, 1999, Ginnie was involved in finding a foster home for JG. This home was to be a legal risk pre-adoptive home. The home chosen for JG was not a legal risk pre-adoptive home. Ginnie understood, prior to placement, that the foster parent was not interested in adopting JG. Ginnie understood that Rebecca Long, an agency employee, was interested in adopting JG. Further, Ginnie understood that the foster home would take JG affording and desiring that Rebecca have the opportunity to establish a relationship with JG. This arrangement would position Rebecca to be a potential adoptive parent for JG should the pending Termination of Parental Rights (TPR) occur. A discussion occurred with her supervisor, Terri Wilkens, informing her of this information. At that time (prior to placement) it was decided by Ginnie and Terri, to go ahead and place JG in this foster home. At the time of placement, Ginnie informed the assigned social worker that the foster parent in this home was in-fact interested in adopting JG. Ginnie also informed the State worker, that our agency works with in these cases, that the foster parent was interested in adopting JG. Ginnie was aware that Rebbeca was spending significant amounts of time with JG. Rebecca and JG stopped by Ginnie's home and Ginnie saw JG at Rebecca's home. As situations occurred Ginnie began to believe that Rebecca's relationship with JG was significant and concerning. Ginnie discussed these situations with her supervisor, with no decisions made to do anything about it until mid-December. Ginnie chose to be a party to not informing the assigned social worker of this significant relationship between Rebecca and JG in part, because she understood the potential impact this could have on the pending TPR. Ginnie is aware of policy 96-2, which addresses agency staff not caring for agency clients. Ginnie is

> aware that significant client relationships and events are to be entered into the agency client record. Ginnie is aware of social worker certification ethics and dual relationship issues.
>
> It is reasonable to conclude from these facts that Ginnie would know that the agency would not support this situation. The responsibility of the Resource Team is to provide services to agency clients as they relate to the case plan – as established by the various Childrens Teams. An appropriate assessment of the foster home being recommended in this situation would have concluded that the placement did not meet the needs of this client or the needs of the case plan. The decision to place JG in this Coun(t)y foster home was in disregard of the case plan and the best interests of JG.
>
> Providing inaccurate information to the assigned social worker (foster parent was willing to adopt) manipulated that workers ability to enter accurate information into the agency client record. Further, the significance of this relationship would require documentation in the agency client record, which could not occur because the assigned social worker was not informed of the relationship. There is no probable cause to believe any criminal wrong doing occurred in this case.

Sherer responded in a memo dated February 29, which states:

> This memo is in response to the information gathered and summarized in a document provided to me by Leo Podoski on 02/28/00 regarding the investigation into the JG Case.
>
> The memo dated 02/23/00 does not make clear who summarized and gathered the information contained in the document as it is unsigned by any particular party. It is unclear to me if the information contained in this document is Mr. Podoski's summary of facts or those of the counsel that "independently" investigated this matter.
>
> Statements made by me during the investigation into the case of JG are absent from the 02/23/00 document. I refute the alleged facts that are stated in this unsigned document.

As noted above, the County suspended Sherer for three days.

Ultimately, the investigation produced a twelve page document headed "Investigation Findings and Conclusion." This document is referred to below as the Investigation. The "Conclusions" portion of the Investigation states:

Based on the Findings set forth hereinabove, it is determined that:

1. JG was to be removed from the Reagan Foster Home and placed in a legal risk pre-adoptive home.

2. JG was placed in the Fenrich Foster Home (June/July 1999).

3. Placement of JG in the Fenrich Foster Home was made knowing that Karen Fenrich was not interested in adopting JG but Becky Long was.

4. Prior to placement of JG in the Fenrich Foster Home Becky Long expressed to Ginnie Sherer and Terri Wilkens a desire to adopt JG.

5. Terri Wilkens and Ginnie Sherer placed JG in the Fenrich Foster Home so that Becky Long could establish a relationship with JG in the event the TPR was successful.

6. Terri Wilkens and Ginnie Sherer placed JG in the Fenrich Foster Home so that Becky Long could establish a relationship with JG in the event the TPR was successful.

7. Terri Wilkens and Ginnie Sherer encouraged Becky Long to establish a relationship with JG.

8. Terri Wilkens did not discuss with Becky Long the parameters/boundaries with regard to JG.

9. Terri Wilkens, Ginnie Sherer and Chris Howe were aware of contact between Becky Long and JG. Their knowledge with regard to the extent of the contact is uncertain.

10. Chris Howe was first aware of the fact that JG was placed in the Fenrich Foster Home because Becky Long was interested in adopting in August/September of 1999 when she was so informed by Terri Wilkens.

11. Neither Terri Wilkens nor Ginnie Sherer had any conversations with Robin Siebecker with regard to JG. Neither wanted to discuss the matter with Robin so as not to create an appearance that may jeopardize the TPR.

12. Chris Howe did not inform Robin Siebecker or any other individual in the Department in August/September of 1999 because she was not aware of anything significant with regard to the relationship between Becky Long and JG at that time.

13. In December of 1999 Terri Wilkens, Ginnie Sherer and Chris Howe became increasingly concerned with the relationship between Becky Long and JG. Terri Wilkens finally approached Leo Podoski with these concerns on December 17, 1999.

14. Robin Siebecker was neither aware of the extent of the relationship between Becky Long and JG nor the fact that Karen was not interested in adopting Juliana.

15. The decision to place JG in the Fenrich Foster Home was in disregard of the plan with regard to JG as well as JG's best interests.

The "Recommendations" section of the Investigation states:

Based on the Findings and Conclusions set forth hereinabove, the following recommendations are made with regard to disciplinary action:

1. Terri Wilkens, by way of her position, should not have allowed JG to be placed in the Fenrich Foster Home in disregard of the plan and JG's best interests. Furthermore, Terri should not have allowed the placement to occur to facilitate the development of a relationship between Becky Long and JG. A five-day suspension without pay is warranted.

2. Ginnie Sherer should not have allowed JG to be placed in the Fenrich Foster Home in disregard of the plan and JG's best interests. Furthermore, Ginnie should not have allowed the placement to occur to facilitate the development of a relationship between Becky Long and JG. A three-day suspension without pay is warranted.

3. Chris Howe should have come forward with her concerns in August/September of 1999 when she first was made aware of the situation. Furthermore, Chris should have informed Robin Siebecker of the relationship between Becky Long and JG, to the extent Chris was made aware. A written reprimand is warranted.

The County implemented these recommendations. Long resigned from the County.

The chronology set forth above is essentially undisputed. The balance of the background is best set forth as an overview of witness testimony.

Leo Podoski

Podoski has served as a County employee for twenty-one years, including two years in his present position. He noted the County adopted Policy 96-2 to avoid conflicts of interest regarding placement decisions involving clients. The County posted the policy bulletin boards, and included it in the Policy Manual.

JG was a County client under the CHIPS process. The permanency plan developed for her in March of 1999 laid the groundwork for her ongoing care through DHS. That plan was reviewed every six months. The TPR process is the outgrowth of a permanency plan where that plan cannot succeed in securing adequate in-home care for a child through the natural family. In JG's case, the TPR process began when it appeared that no level of County service could unite JG's biological mother or father with JG in a safe environment. The TPR process for JG was coordinated through Siebecker, Howe and the Corporation Counsel's office.

Podoski acknowledged that the June 10, 1999 placement was caused by the closure of the Reagan Foster Home. He did not know the factors that prompted the closure, but he felt that the permanency plan called for placing JG in a legal risk preadoptive home. The Fenrich Foster Home, in his view, was no more than a receiving home for JG. Even assuming that such a legal risk preadoptive home placement was not possible on June 10 did not, in Podoski's view, obscure the need to secure such a placement as soon as possible. He concluded that Sherer had not taken such steps.

He based this conclusion in part on statements supplied during the investigation by Patricia Lancour and Anne Fuenger, who are employees of the State of Wisconsin Department of Health and Family Services. They assist in coordinating placements, including legal risk preadoptive homes. Lancour's statement indicates that she spoke with Sherer concerning JG's placement by phone on June 14, 1999. Lancour's notes of that conversation read thus:

> p/c with Ginny Sherer, Winnebago County foster home coordinator, informed her that the Department may have a legal risk preadoptive home for JG; an Outagamie County family who is currently licensed, has another minority child & is interested in adoption. Ginny informed this worker that the current family had expressed an interest in adopting her and given the move she recently endured (the abrupt move from the Reagans) that perhaps leaving her in that home would be best.

Fuenger's statement indicated to Podoski that Karen Fenrich had no interest in adopting JG, but that Long did. Fuenger's statement on this point reads thus:

> Becky called to say that there was a little girl at Karen Fenrich's home that Becky thought would be a good fit for her family . . . Someone from Winnebago County asked Pat Lancour to find an at-risk adoptive home for this little girl . . . Karen Fenrich is the current foster parent for this little girl and is not interested in adopting this child because the little girl's parent or parents have a reputation for violence and they are dangerous. Karen does not want to expose her family to this.

These statements, considered with the interviews of County employees, convinced Podoski that Wilkens and Sherer placed JG in the Fenrick Foster Home as a receiving home. In his view, the permanency plan should have dictated efforts to make a single placement.

Further complicating this was Sherer's and Wilkens' desire to assist Long in her efforts to adopt JG. Apart from the issue that Fenrich, as the home provider, had no interest in adopting JG was the conflict of interest involved in making a County employee the adoptive possibility. Encouraging Long to build a relationship with JG exacerbated the conflict of interest issue, and put Long and those assisting her in violation of the spirit, if not the letter of Policy 96-2. Podoski stated that Sherer acknowledged during the investigation that she, Wilkens and Long collaborated on the placement of JG in the Fenrich Foster Home. Fenrich, he added, indicated that Sherer and Wilkens encouraged her to take placement of JG to assist Long.

Sherer's desire to assist Long also led Sherer to mislead Lancour concerning Fenrich's desire to adopt. This pattern of behavior warranted, in Podoski's view, a three-day suspension. Of greatest concern to Podoski was that Sherer had assisted in a placement that put Long's interest in adopting JG ahead of JG's best interests as reflected in the permanency plan. The placement alternatives available on June 10, 1999, had no impact upon this consideration. Wilkens received a greater suspension because of her status as supervisor. Long would have been disciplined had she remained a County employee.

Grant Thomas

Thomas was, at the times relevant to the grievance, an Assistant Corporation Counsel for the County. He was involved in advocating the CHIPS matter that prompted Policy 96-2. Long's status as a County employee actively seeking to secure the placement of two children subject to the CHIPS proceeding posed, in his view, ethical issues and potential issues of tort liability for the County. At a minimum, even the appearance of conflict of interest type issues risked tainting CHIPS or TPR matters. Sherer served as a caseworker on the matter, prior to the County's contracting of case management of the matter to another county. Sherer and Thomas

actively discussed Thomas' concerns. He stated that the implementation of Policy 96-2 caused a certain amount of controversy within DHS, since "there was some disagreement on perhaps a philosophical basis for the policy and the need for the policy" (Transcript, Tr., at 85).

Thomas characterized Sherer's performance as a social worker as "(e)xcellent", and he placed her "among the top social workers we had in the County during my tenure" (Tr. at 89).

Terri Wilkens

Wilkens has served as Resource Team Supervisor for roughly two years. She noted that she and Sherer collaborated in the decision to place JG at the Fenrich Foster Home. They did so knowing that Long, unlike Fenrich, was interested in adopting JG. She noted that Sherer did voice concerns regarding Long's relationship to JG when Sherer learned Long was thinking about changing JG's name. Wilkens estimated this occurred in late September or October, 1999.

Wilkens stated that the original placement at the Fenrich Foster Home reflected the absence of alternatives. She denied that, even in hindsight, the June 10, 1999, placement was flawed. Rather, it was a practical necessity at the time, reflecting the emergency caused by the closure of the Reagan Foster Home. Viewed with hindsight, Wilkens thought that Long's involvement with JG tainted the placement.

The closure of the Reagan Foster Home reflected DHS concerns with the well-being of foster children, including JG. Sherer, at the time of the placement, indicated to Wilkens that Fenrich did not wish to adopt JG, but would take placement of her for Long. Roughly two weeks prior to JG's placement, Fenrich informed Wilkens and Sherer that Fenrich hoped to adopt a child of JG's age. Wilkens was aware, at the time of the placement, that Fenrich had adopted children originally placed with her by the County on a temporary basis.

Wilkens acknowledged that a conspiracy of County employees to manipulate the placement process to advance the adoption efforts of a County employee would be improper. She denied that any such conspiracy occurred in the JG placement. She was unaware at what point Lancour offered to move JG, but felt that in July of 1999, JG was placed in the best environment possible.

Long's relationship with JG had, by late October or early November, become improper. Wilkens stated "I know Ginnie felt something needed to be done, and I also felt at that point that things got out of hand" (Tr. at 102). She then informed Long that she would discuss the matter with Podoski. This resulted in the termination of any relationship between JG and Long.

John Bodnar

Bodnar has served the County for roughly twenty years, including eleven as its Corporation Counsel. Bodnar recommended the voluntary dismissal of the TPR in JG's case when Seifert informed him that the file did not note JG's placement in a home through which Long had cultivated a parent-like relationship with JG, including overnight stays. The impropriety of the relationship and its omission in County record posed, in his view, serious ethical issues possibly branching into civil and criminal liability. He recommended the investigation of the matter, but did not participate in it due to the close working relationship between his office and DHS personnel. He did not review the findings of the investigation with DHS personnel.

Bodnar has enjoyed a good working relationship with Sherer, whom he views as in "the top five percent of the workers I work with" (Tr. at 122-123). At the time he recommended a DHS investigation, he had no idea Sherer had any involvement in the JG placement.

Virginia Sherer

Sherer has served the County for twenty-one years, serving on the Resource Team since March of 1999. She played no role in the decision to close the Reagan Foster Home, but did work with a team to place the children affected by its closure. Prior to the closure of the Reagan Foster Home, she and Wilkens had discussed Fenrich's desire to adopt a two to three year old female child. Shortly after the closure, Sherer phoned Fenrich about accepting placement for JG. Fenrich responded that "what she would like to see happen would be for Becky Long to adopt that child" (Tr. at 132). Sherer was concerned about this statement, and discussed it with Wilkens. She never informed Wilkens that Fenrich would accept placement of JG as a surrogate for Long's interest in adoption.

Sherer has worked with Fenrich before, and has placed children with Fenrich on a receiving basis. In three such cases, Fenrich professed no long-term interest in the children, but in each case adopted. Sherer believed this might happen again with JG. She analogized the bond that results in adoption to a courtship that results in marriage. Each requires time to develop a relationship that neither party can necessarily commit to prior to the development of a loving bond. Thus, Fenrich's initial denial of a long-term interest in JG did not preclude adoption. At no point in the placement process did she see herself in violation of Policy 96-2. At no point in the placement process did she encourage Long to develop a long-term relationship with JG.

Sherer felt that there were no good placement options regarding JG in June of 1999, and that the difficulty with the placement traced to Wilkens' permitting Long too much latitude to develop a parent-like relationship with JG. Sherer became concerned about that relationship in July of 1999, when she heard JG refer to Long as "mommy." She voiced her concern to Wilkens shortly after this. The following October, Sherer heard JG refer to herself as "Kendal."

Sherer was aware that Long wanted to adopt JG, and intended to change JG's name. Sherer approached Long and discussed the matter. In late September or early October, Fenrich had a child hospitalized, and spent time at the hospital with the child. Other foster parents assisted with the children in her home, but Sherer was unsure who was caring for JG. She approached Wilkens and tried to warn her to keep some distance between JG and Long, particularly regarding overnight stays. None of the conversations between Sherer and Wilkens between July and November of produced further action. By December of 1999, Sherer became more insistent on the issue and repeatedly informed Wilkens that Sherer would approach Podoski if Wilkens would not.

Sherer specifically denied the existence of any "conspiracy" regarding JG's placement. That placement, in any event, was for foster care. Legal risk placements are made by the State. She could not recall speaking with Lancour about arrangements for JG other than the Fenrich Foster Home. She did not approach Podoski directly until December because perhaps three supervisors were aware of the JG/Long relationship and none chose to act on it. Sherer had asked Long, perhaps in August of 1999, about Siebecker's understanding of her relationship with JG. Long responded that Howe agreed with Long that Siebecker need not know of it.

Sherer also denied that Long ever participated in the placement decision. Long walked in on a conversation between Wilkens and Sherer over placement in the Fenrich Foster Home, but Long played no role in the decision. Sherer acknowledged she was aware, prior to the placement, that Long wanted to adopt JG. Wilkens informed Long that she should form a relationship with JG, but Sherer neither made nor approved of that statement.

Sherer noted that she was given the 2-23-00 memo on the day before she received her three-day suspension. Podoski and Wendt summoned her to a meeting. She appeared at the meeting accompanied by three Union representatives and an attorney. Podoski and Wendt gave her the memo, and informed her that she would be given twenty minutes to read it and respond to it. After reviewing the memo, she was convinced she was about to be fired. On the advice of her attorney, she asked for, and received, twenty-four hours to make a written response. That response is set forth above.

In retrospect, Sherer believed she should have approached Bodnar directly, well before December of 1999. She characterized the situation she confronted thus:

> You know, I went to – I went to Teri Wilkens on more than one occasion, Chris Howe certainly knew of the situation, she supervised Robin Siebecker. If she wanted some different placement, she could have asked . . . She didn't tell Robin Siebecker anything, but yet myself . . . I'm supposed to trod into Leo Podoski's office, and, you know, create this big furor for our entire division. It was bad enough with your investigation that for months I didn't have any coworkers

> speaking to me for the action that I took, and that was with the support of my supervisor . . . No, I would not have gone to Mr. Podoski in this situation, because it was horrible for me, being a whistle-blower and being treated the way that I was by my coworkers, as well as administration (Tr. at 152-153).

Kathryn Stark

Stark is the Adult Foster Family Care Coordinator, and President of the Union. She and one other Union representative witnessed each interview with unit members. She felt the procedure of the investigation was flawed, in that each unit employee was told to be at their office the day before the interview and that Podoski would accompany them to a meeting. The County gave no notice of the purpose of the meeting or what subjects might be discussed. The unit members were given no time to prepare or to review case files. She also questioned the propriety of Podoski actively participating in the interviewing process. The investigation afforded, in her view, no cause to discipline Sherer.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The County's Initial Brief

After a review of the record, the County asserts that the generally accepted elements of just cause are stated in the seven tests posited by Arbitrator Carroll Daugherty in ENTERPRISE WIRE CO., 46 LA 359 (1966). Evaluation of the evidence in light of those standards "conclusively demonstrates that the County acted reasonably and with 'just cause' in suspending the Grievant for three (3) days." As preface to its examination of the seven standards, the County contends that its investigation proved that Sherer engaged in the conduct for which she was suspended. More specifically, the County argues that Sherer failed to properly place JG, and "provided false information to others involved in this case."

The first of the standards governing this conduct concerns notice. The County asserts that it implemented Policy 96-2 under the authority set in Article 9 of the labor agreement. The policy "was posted on designated bulletin boards . . . and included in the Policy and Procedure Manuals available to employees." Beyond this, Sherer acknowledged she was aware of the policy. In any event, Sherer was actively involved in the situation that prompted Policy 96-2. That the conduct might have disciplinary significance is established by Article 8. The need for, and significance of, providing accurate information is a common sense matter, as well as a function of Sherer's training.

Policy 96-2 and "the need to provide accurate information" are "reasonably related to the orderly, efficient and safe operation of the County's business and to the conduct the County may properly expect of its employees." The County's promulgation and enforcement of Policy 96-2 avoids conflicts of interest and shields the County from potentially significant civil liability. The policy is reasonably related to the County's operation of its social services department, and governs performance that should be expected of Sherer.

Since the County, "before disciplining the Grievant, conducted a thorough investigation", it has complied with the next element of the Daugherty standards. The County contracted with an outside law firm to assist in its internal investigation. That investigation resulted in the interviewing of ten individuals, and the compilation of a significant amount of data. The investigation established Sherer's culpability as well as the absence of mitigating circumstances.

The investigation was, as required by the Daugherty analysis, "fair and objective." The independent firm "had no bias or affiliation with" DHS or Sherer.

As a result of the investigation, the County determined that substantial evidence indicated Sherer had placed JG in the Fenrich Foster Home even though Fenrich "was adamant that she was not interested in adopting J.G." Prior to imposing discipline, the County afforded Sherer the opportunity to "review the evidence against her and to raise any questions she had as to the evidence." She raised no questions. Thus, the County acted on substantial and uncontroverted evidence. In any event, a review of the evidence establishes that the County had a substantial evidentiary basis to ground its conclusion that Sherer had engaged in a significant level of misconduct.

Under the labor agreement, the discipline could appropriately range from a written reprimand to a discharge. Thus, "the discipline imposed may be at any level so long as it is consistent with the seriousness of the infraction." Even though Sherer may not have been guilty of deliberate misconduct, the evidence manifests "an exercise of extremely poor judgment on the Grievant's part." The underlying conduct touches on sensitive policy issues concerning the care of children, and thus warrants a suspension. Put in terms of the Daugherty analysis, the evidence establishes that the County applied its rules without discrimination. Each of the individuals involved in the placement of JG received discipline, except Long, who "would have been disciplined had she not resigned prior to the completion of the investigation." Beyond this, the suspension "was reasonably related to the seriousness . . . of the established misconduct." The County concludes that it has proven each of the seven elements of the just cause standard.

Arbitral precedent and basic employment policy dictate that the decision to discipline must be the employer's, not an arbitrator's. The suspension should not be modified unless it can be proven "discriminatory, unfair or arbitrary and capricious." No persuasive evidence supports such a conclusion, and thus "the grievance is without merit and, therefore, must be denied."

The Union's Initial Brief

The Union states the issues for decision thus:

> Did the County have just cause to suspend the Grievant for three days? If not, what is the remedy?

After a review of the record, the Union argues that "the suspension was inappropriate on many grounds."

More specifically, the Union contends that Sherer's placement of JG in the Fenrich foster home "was appropriate under the circumstances." Podoski's concern that JG receive a "legal risk placement" is an after-the-fact conclusion, reflecting no more than that JG's placement "was the right decision at the time." Sherer, after consulting with her supervisor, concluded that, since both of JG's parents had been incarcerated, an emergency existed and that the Fenrich home was the best available placement. Fenrich had, in addition, adopted prior placements made by Sherer, even after first disavowing any interest in adoption. Under any reasonable view of the circumstances, Sherer acted appropriately in placing JG.

Beyond this, the Union contends that Sherer's "veracity and professionalism are above reproach." This is established by County as well as by Union witnesses. Long service, unblemished by discipline, is often taken by arbitrators as a basis to reduce penalties. Even though "no discipline is warranted in this matter," the Union concludes that if any discipline is imposed, it should be at a level below a suspension.

Nor is the weakness of the discipline founded only on Sherer's employment history, since "the County did not conduct a fair investigation in this matter." The investigation was clouded by Podoski's "desire to find a nonexistent conspiracy." A review of the testimony establishes there was no general effort to "help Becky Long establish an inappropriate relationship with J.G."

Perhaps "the most disturbing" aspect of this matter "is that the County suspended the one person who fought to bring the Becky Long situation to light." Sherer attempted to get Wilkens to inform Podoski that Long was developing a relationship with JG, but failed. The "end result" earned by Sherer is that the County "shot the messenger." The underlying evidence is sufficiently troubling that the Union asserts that "the County's actions in this matter may have crossed into the prohibited realm of retaliation against whistleblowers."

Viewing the record as a whole, the Union concludes that Sherer's "three-day suspension is clearly unjust", and requests "that this grievance be sustained and that the County be ordered to make Ginnie Sherer whole."

The County's Reply Brief

The County notes that "a short-term placement of J.G. in the Fenrich Foster Home (1 or 2 days at most) may have been appropriate because of a lack of other alternatives", but concludes that "ultimately the Grievant failed to locate, recommend and facilitate a long-term legal-risk placement . . . as was needed." More specifically, the County notes that Sherer ignored Fenrich's denial of any interest in adopting JG. That Lancour advised Sherer in mid-June of 1999 that the State might have a "legal risk adoptive home" for JG underscores how little effort was required of Sherer to address JG's long-term interests.

More significantly, the Union failed to rebut Lancour's detailed notes regarding a conversation with Sherer, during which she actively attempted to keep JG at Fenrich's home. General testimony concerning her past work record cannot be considered to persuasively address this point. Beyond this, the quality of Sherer's past work record only underscores the weakness of her judgement in this instance. That Sherer failed to voice her concerns regarding JG's placement until December of 1999 further underscores the discrepancy between her past work performance and her conduct regarding JG. Union assertions concerning Sherer's unwillingness to bypass Wilkens to speak with Podoski cannot explain past instances when Sherer paid no attention to the chain of command.

Beyond this, "the record conclusively demonstrates that the Grievant collaborated with Terri Wilkens and Becky Long to manipulate the adoption process in favor of Becky Long." A review of the evidence establishes, according to the County, that "the record in this case provides no basis to mitigate the discipline imposed by the County against the Grievant."

Nor can the Union's attack on the County's investigation be credited. Podoski did no more in the investigation than to serve "as advisor because of the technical nature of the issues involved." The investigation was unbiased and produced substantial evidence that Sherer violated Policy 96-2.

Nor can Sherer be characterized as a whistleblower. Sherer's failure to voice any concerns until December of 1999 undercut such a characterization. A review of the evidence indicates that Sherer is attempting no more than "to wash her hands of her misconduct because her guilty conscience finally got the best of her." Arbitral precedent confirms that conduct resulting in a conflict of interest "is serious and warrants strong discipline." The evidence establishes that Sherer failed to do her job, thus disregarding JG's long-term interests, creating a conflict of interest undermining the reputation of the department, and potentially creating "significant criminal and civil liability for the County."

Because the evidence establishes that Sherer committed the underlying misconduct and that the County's imposition of a three-day suspension reasonably reflected its disciplinary interest in that conduct, the suspension must stand, without regard to the Arbitrator's "personal judgment."

The Union's Reply Brief

The Union notes that "the parties have never agreed to apply Daugherty's tests in past disciplinary cases," and "that arbitrators do not uniformly adhere to these tests." The Union concludes from this that it "therefore defers to the Arbitrator's judgment as to whether Daugherty's tests are applied to determine whether or not discipline was justly served in this matter." The Union structures its reply brief around those seven standards.

Contrary to Policy 96-2, Article 8 of the labor agreement sets forth a system of progressive discipline ranging from "written reprimands" to "suspensions" and culminating in "discharge". Thus, even if the policy applies, the County should have imposed a written reprimand. Under no reasonable view of the evidence can "the grievant's actions be seen as justifying extreme disciplinary measures." Beyond this, "common sense" has little to due with notice to Sherer of the consequence of her actions, which turn on "the gray areas of professional judgment." In any event, there is no evidence of any conspiracy to place JG with Long.

Beyond this, the Union contends that Policy 96-2 "does not apply in this matter". The policy proscribes allowing any department employee to become a legally responsible guardian or care provider for a child serviced by the County. Sherer never acted to "allow" Long to assume such status, and in fact acted to oppose the development of a relationship implying such status. Thus, County action against her must rest on an "unwritten rule" reflecting no more than Podoski's disappointment that Sherer did not bypass her supervisor "and proceed directly to him when she developed suspicions about Becky Long."

Nor can the County's investigation be considered fair or objective. Rather, "the County performed an investigation of sorts" headed by Podoski, who "was convinced that some sort of conspiracy was taking place." To defer to the summary conclusions of the law firm's investigation "seems to be granting the employer too much discretion." If anything, the investigation manifests the County's excessive zeal to avoid a repeat of a prior incident.

Nor did the investigation produce substantial evidence of misconduct. Lancour's notes show only that the State "may" have found a legal risk adoptive home, and that Sherer opposed moving JG unnecessarily. Even if finding such a placement was Sherer's duty, the evidence establishes that that possibility of adoption is the determining factor. Sherer had concluded that such a possibility did exist in light of Fenrich's past adoptions. The County's desire to impose "hard and fast rules and easy decisions" should not obscure "reality with regard to issues of child

welfare." A social worker "must be allowed to make difficult judgment calls on the spot without fear of reprisal once all of the facts are known." That Sherer took appropriate action when she

became aware of Long's involvement with JG is established in the evidence.

Nor can the County contend it has applied its rules even-handedly. Sherer's suspension is graphic demonstration of "shooting the messenger." This hardly warrants status as past practice. One of Sherer's supervisors received a written reprimand, and one was suspended. Ignoring the inconsistency, it is apparent that if a conspiracy existed, the County is sending the message that the appropriate employee response "is to keep your mouth shut." Beyond this, the suspension imposed on Sherer ignores her stellar work record.

The Union concludes that the application of the Daugherty standards demands that the discipline be overturned.

DISCUSSION

I have adopted the County's statement of the issues. As a contractual matter, Articles 1 and 8 govern the grievance. The reference to Article 9 is to underscore the role of Policy 96-2 in Sherer's discipline. The Union does not, however, challenge the reasonableness of Policy 96-2 as a policy matter. Rather, the Union challenges its application to Sherer. Thus, the issue on the merits turns on whether the County had just cause to discipline Sherer for improperly performing her job duties and for providing false information to others. Article 9 plays no direct role in the resolution of that issue.

As a prefatory issue, the parties question the standards governing just cause. The County cites the "Daugherty" standards, see ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966). The Union does not concede that they govern this labor agreement, but uses them to structure its arguments. The discussion that follows uses the seven standards as its structure. This reflects no more than a means to address the parties' positions.

The binding force of the just cause provision, or any standards defining it, flows from the parties' accord, as stated in the labor agreement. However persuasive as a general or an academic matter, the Daugherty standards should not, in my view, be treated to stand alone as a binding definition of "just cause." To do so elevates arbitral inference to contract creation. Contract creation should be left to the bargaining parties. More specifically, the fit of the elaborate procedural requirements of ENTERPRISE WIRE on smaller employing entities should not be taken as a given. Beyond this, the requirements should not be imposed on any contracting party to the exclusion of past practice, bargaining history or other factors within the bargaining parties' control. Those factors, in my view, establish in fact what constitutes the binding features of a bargaining relationship.

The standards themselves are stated, but cannot be applied, as if they are purely procedural. Strictly read, the seven requirements focus on the employer's investigation to the

exclusion of whether the grievant committed a disciplinable offense. ENTERPRISE WIRE itself falls short of this mark, since it is apparent the testimony at hearing turned on whether the alleged offenses occurred as alleged. This tension between a purely procedural analysis of the employer's investigation and a substantive analysis of the allegations is reflected in the seven standards. The fifth standard, for example, turns on whether the investigation provided "substantial evidence" of guilt. Is an investigation infirm that does not uncover all the evidence produced at the arbitration hearing? Is an employer obligated to investigate the matter as fully as it is prepared to try it? How many employers or unions can muster two complete investigations, one for the "investigation" and a second for the arbitrator? The delays inherent in investigation forestall action. To my experience, an employer investigates an offense to the point that it is convinced prompt action is necessary. Assuming this comports with the "substantial" requirement of standard 5, should an arbitrator ignore evidence discovered or presented after the employer's investigation? It is at least arguable that an employer could acquire "substantial" evidence of an offense a grievant did not commit. Any grievance posing a credibility dispute can fall in this area. In my view, the parties expect, and should expect an arbitration hearing to consider whether the alleged misconduct actually occurred.

As a matter of practice, arbitration hearings tend to focus on whether the grievant committed a disciplinable offense and whether the sanction imposed reasonably reflects the employer's interest in that offense. Compare, for example, BLUE CROSS/BLUE SHIELD, 104 LA 635 (House, 1995). The Daugherty standards should not, in my view, be read to conflict with this practical approach.

In any event, the parties have at least acknowledged the utility of the seven Daugherty standards. The interpretive dispute focuses on the fifth and seventh standards.

I.

There is no dispute that Sherer was aware that the conduct she is accused of has disciplinary significance. Podoski's testimony honed the County's disciplinary interest on the propriety of Sherer's placement of JG, and on whether she provided false information to Lancour and others. Sherer was involved in the processing of the matter that prompted Policy 96-2, and testified that she supported it. There is, in any event, no dispute that if she acted against JG's long term interests, as reflected in the permanency plan, she would be violating the trust placed in her position. Beyond this, no competent social worker could credibly claim that an employer has no disciplinary interest in the accuracy of the information provided concerning the foster placement of a juvenile (compare to Note 3 to question 1 of ENTERPRISE WIRE, 46 LA at 363). Placement of a juvenile whose parents may not be able to legally claim custody poses an inevitably complex, if not impossible, issue to resolve. Such an issue demands the candor of every participant.

The Union does not question whether Sherer was warned of the disciplinary

consequences of her actions. Rather, the Union questions whether she actually committed the actions she was punished for. Notice affords no basis to question the discipline.

II.

This standard tracks the first. Podoski's expectation that JG be placed in accordance with her permanency plan rather than in the interest of a potentially adoptive parent, who is a County employee, is fundamental to the orderly operation of DHS and the maintenance of public trust in it. Here, as with the first standard, the issue is not whether Podoski could reasonably expect Sherer to act in JG's long-term interests in placing JG, or in responding to others concerning that placement. Rather, the issue is whether she committed the acts she was disciplined for.

III.

As Stark noted, questions can be raised regarding the County's investigation. Among the professional employees involved in this matter, questions are inevitable. It cannot, however, be doubted that the County "made an effort to discover whether" Sherer "did in fact violate or disobey a rule or order of management." The investigation included interviews of no fewer than a dozen people.

The record is, however, silent regarding the substance of the interviews. The investigation findings are stated as conclusions, and it is less than apparent how certain conclusions were reached, or on what evidence they rest. This is of some significance to this standard. As Daugherty stated this standard, how the employee was given their "day in court" (46 LA at 363) is crucial. It is not clear how Sherer was afforded this opportunity. The record is silent on how she was interviewed prior to the meeting that occurred the day before the County imposed the suspension. At that meeting, she was given the 2-23-00 memo and afforded twenty minutes to rebut it. It is apparent from this that the investigation was, by this time, not a disinterested search for fact. Rather, it had reached the point that conclusions had been drawn and discipline was imminent. How it got to this point is not clear. No more clear is how this afforded Sherer a day in court prior to the time probably irrevocable decisions had been made. That the County afforded Union representatives the opportunity to view the interviews, however, makes it unpersuasive to hold the silence of the record on this point against the discipline.

In sum, the evidence does not support a conclusion that the County failed to make a diligent effort to determine fact prior to the imposition of discipline. However, the evidence regarding Sherer's opportunity to effectively tell her side of the story lends a troublesome undercurrent to this conclusion.

IV.

As noted above, there is some basis to question the investigation. On balance, however, the need for, and quality of the investigation cannot be persuasively questioned under this standard. The potential conflict of interest noted in the Corporation Counsel's office at the time that Long's extensive involvement with JG became known is a serious issue. It tainted the TPR, and arguably violated Policy 96-2. Even ignoring potential issues of civil or criminal liability, the issue concerning the impact of the actions of DHS employees who were aware of Long's desire to adopt on JG's and JG's parents' rights was significant.

That the implementation of Policy 96-2 provoked controversy at the time of its implementation and at the time of its enforcement regarding JG must be noted. The policy perspective from the points of view of those officers of the court who try a TPR and those individuals who may adopt as a result of a TPR are not synonymous. The desire to adopt is what makes Long or Fenrich valuable to the process, and valuable in a more meaningful sense. That Long would seek to befriend an effectively orphaned child can hardly be characterized as a vice. However, this does no more than state the complexity of this situation. That complexity can not obscure the need for the County to assure truly due process regarding a TPR proceeding. The investigation sought to assure that the conduct of DHS employees met standards of legal propriety.

Stark questioned whether interviewed employees should have been notified of the subject of the investigation, and provided an opportunity to prepare for the interviews. The investigation evidently valued spontaneous responses more than Stark thought desirable. Neither approach can be dismissed as unreasonable. The issue here is not whether the investigation was flawless, or could have been improved. Rather, the issue is whether the County made an investigation that sought fact on which to act. The evidence will not support a conclusion that the County conducted a sham investigation to rationalize preconceived notions, or merely "went through the motions."

The Union questions Podoski's involvement in the investigation. Standing alone, the involvement of a DHS supervisor does not taint the investigation. The decision to discipline is the County's. It is unremarkable, standing alone, that the County would delegate the authority to oversee the investigation to Podoski. That the Union was permitted to view the interviews underscores the soundness of the investigation under this standard. Thus, this standard affords no persuasive basis to question the discipline.

V.

The discipline reflects a determination that Sherer improperly placed JG in the Fenrich Foster Home and misrepresented information concerning that placement to further Long's interests in adopting JG. As noted above, this standard highlights a tension between the investigation procedure and its conclusions as demonstrated at the arbitration hearing.

"Conspiracy" may be too loaded a term to ascribe to the investigation's assessment of Sherer's conduct, but it is evident the investigation determined Sherer actively colluded with other County employees to bend the placement process in Long's favor. Podoski was not unwilling to characterize the effort as a conspiracy. The 2-23-00 memo underscores this, as does the Investigation in the "Conclusions" section at paragraphs 3, 4, 5, 6, 7, 8, 9 and 15. In any event, the discipline held Sherer responsible for acts of omission and commission that furthered Long's interests, whether or not that can be labeled a "conspiracy." Broadly speaking, the alleged misconduct focuses on Sherer's role in three areas: (1) Her role in placing JG in the Fenrich Foster Home on June 10, 1999; (2) Her failure to place JG in a legal risk preadoptive home after that date; and (3) Her failure to report or to document Long's excessive involvement in JG's care.

The evidence establishes a breakdown in DHS communications concerning Long's involvement with JG. The evidence adduced at hearing will not, however, support any of the three broad areas of misconduct to the degree asserted by the County.

The County faults the initial placement of JG in the Fenrich Foster Home for essentially two reasons. The first is that the Fenrich Foster Home is a receiving home, not a legal risk preadoptive home. The second is that the placement in effect sought to advance Long's adoptive interests to the possible detriment of JG's.

It is undisputed that the JG's placement in the Fenrich Foster Home on June 10, 1999, reflected a bona fide emergency caused by the closure of the Reagan Foster Home. Sherer's and Wilkens' testimony that there were no effective placement options to the Fenrich Foster Home stands uncontradicted. Wilkens' testimony on this point is noteworthy. She testified candidly that she felt her discipline rested more on County perception of reality than fact, and was unbowed in asserting that whatever happened after June 10, 1999, there were no true alternatives to the Fenrich Foster Home. Sherer's testimony confirmed this, and there is no evidence of any alternative. Thus, the June 10, 1999 placement into a receiving home cannot be considered conduct in which the County has a disciplinary interest.

Whether the Fenrich Foster Home is a legal risk preadoptive home poses a more subtle point. The evidence affords, however, no persuasive reason to doubt Sherer's testimony that it was. Podoski acknowledged that the realistic possibility of adoption makes a receiving home a legal risk preadoptive home. The State of Wisconsin plays the significant role in preadoptive placements. That Sherer lacked the independent authority to effect such a placement must be considered in assessing her exercise of judgement on this point. More significantly, her testimony credibly establishes that she made the placement reasonably believing the Fenrich Foster Home afforded this option. It is undisputed that the adoptive process is something akin to a courtship by which the parties learn about each other prior to making a commitment.

Fenrich had informed Wilkens and Sherer well before JG's placement that she would like to

adopt an infant girl. Sherer knew from past experience that Fenrich had adopted children originally placed with her on a receiving basis. Against this background, Sherer's conclusion that Fenrich might plausibly consider adopting JG was a reasonable conclusion. This makes the Fenrich Foster Home a viable legal risk preadoptive placement. Thus, the County has not demonstrated any disciplinary interest in JG's placement in the Fenrich Foster Home on June 10, 1999.

This conclusion serves as a preface to the second broad assertion of misconduct. The original placement was defective, without regard to the conclusion stated above, if done to advance Long's adoptive interests to the detriment of JG's. The evidence on this point is troublesome, but fails to support the County's assertion that Sherer sought to effect and maintain placement at the Fenrich Foster Home to further Long's interests.

The most troubling aspect of this allegation is the asserted misrepresentation by Sherer to Lancour regarding a potential preadoptive placement in Outagamie County. Lancour's written notes indicate she discussed this point with Sherer on June 14, 1999. Sherer could not recall the conversation. This poses no significant issue, however, since Lancour's notes are consistent with Sherer's testimony. More specifically, Lancour's notes indicate that Sherer stated she viewed Fenrich as a legitimate adoption option and that moving JG so soon would be adverse to JG. Although Sherer could not recall the conversation, these notes are consistent with her testimony regarding the appropriate options for JG. More significant than this is Wilkens' testimony that she viewed the placement options in the same light, even after the impostion of a five-day suspension. Moving JG in July of 1999, even in retrospect, was a poor option to Wilkens. Lancour's notes, in any event, establish that she was aware of Long's adoptive interest in JG no later than July of 1999. The notes establish that she regarded Long as an adoptive option. It is clear that Lancour attributed no significance to a non-familial relationship between Long and JG, since it would not give her a "leg up" on being chosen as the adoptive home. Thus, as of July of 1999, JG's placement in the Fenrich Foster Home posed no significant issues. Those issues developed over time as Long became increasingly involved in a parent-like relationship with JG.

Whether or not it was ultimately in JG's interest to be moved to Outagamie County in July of 1999 is an unanswerable question from an arbitration perspective. Even if that was the best available option, the evidence establishes that Sherer did not misrepresent fact to Lancour. Rather, she stated her professional judgement that JG was best placed where she was. She cannot be faulted for that. There is no demonstrated disciplinary interest in Sherer's contact with Lancour or with Sherer's defense of the Fenrich Foster Home as an appropriate placement in July of 1999.

This poses the most significant aspect of the asserted disciplinary interest. It is also the

most difficult to pin down. The County's disciplinary interest in DHS employee conduct is traceable from the TPR, which is itself traceable to the permanency plan. The County must act to further JG's interests as reflected in the permanency plan. Conduct that skewed the TPR process toward Long's adoptive interest, even if only arguably away from JG's, must be considered conduct in which the County retains a disciplinary interest.

The difficulty is to equate this policy interest with proven employee conduct. The Investigation and the 2-23-00 memo manifest a tension in labeling the improper conduct a conspiracy. The Investigation's "Conclusions" section points to a concerted effort to assist Long at Paragraphs 3, 4, 5, 6, 7, 8, 11 and 15. The 2-23-00 memo is similar in tone.

The evidence does not, however, support a conclusion that there was a concerted effort to skew the adoptive process toward Long. The Investigation's Conclusions are not internally consistent regarding a "conspiracy." Paragraphs 9 and 13 of the Investigation's Conclusions stop well short of affirming an active and joint effort by Sherer, Wilkens and Howe. Paragraph 9 notes that these employees' knowledge of "the extent of the contact" between JG and Long "is uncertain." This is difficult to square with the assertion that they were actively colluding with Long to skew the process. More significantly, Paragraph 13 notes that the three grew "increasingly concerned" regarding contact between JG and Long. Assuming the goal of their collusion was to skew the process to Long, it is not clear why any of the three would be concerned on this point. Assuming the concern was that the contact went too far, it is not clear why the colluding employees would choose to approach anyone other than Long.

This tension is well rooted in the evidence. The evidence establishes not a conspiracy, but a series of often unrelated decisions that led to a relationship between JG and Long that over time spiraled out of control. The evidence will not support a considered effort by Wilkens, Sherer and Howe to further Long's adoptive interests without regard to JG's. Rather, the evidence will support a conclusion that Sherer, with other DHS employees, made a series of decisions in JG's interest that had a potential and coincidental benefit of advancing Long's adoptive interests. When Long's relationship with JG went beyond basic care-giving to a more parental relationship, the potential and coincidental benefits vanished, and Long's adoptive interests arguably became adverse to JG's.

Wilkens and Sherer each emphatically denied an active conspiracy. Their testimony is credible. Wilkens, in particular, had little reason to disagree with DHS management. She could expect no benefit from challenging the Investigation's conclusions, and had already been suspended for five days. More significantly, corroborative evidence underscores the reliability of that testimony. The assertion of conspiracy cannot account for any expression of concern on Sherer's or Wilkens' part concerning the depth of Long's relationship with JG. Nor can it account for either employee approaching DHS management rather than Long at any point in the adoptive process.

A conclusion that a series of decisions made in JG's interest spiraled out of control can

more reliably account for the evidence. Long, Sherer and Wilkens were candid throughout the placement process regarding Long's adoptive interest. Fuenger's and Lancour's statements each manifest that Long made her interest known and open to them. Neither regarded that interest or a relationship between JG and Long as inherently objectionable. Rather, Fuenger and Lancour indicated to Long that her interest would be considered, but placement would be to the best family for JG. At no point did either express to Long that she could achieve, by any means, a preferential position.

No more apparent is any conduct by Sherer to indicate to Long that she could achieve a preferential position by cultivating a parent-like relationship with JG. To the contrary, Sherer's unrebutted testimony establishes she voiced concern to Wilkens from July to December regarding the developing bond between JG and Long. Nor is there any persuasive evidence to indicate Wilkens encouraged Long to develop a parent like relationship to JG. Investigation Conclusions 8 and 9 are well rooted in the evidence. They indicate the relationship spiraled beyond Wilkens' comfort level, without apparent active involvement on her or Sherer's part.

Wilkens and Sherer's testimony is, in any event credible. Their testimony was not that of conspirators. Sherer, at points, lays responsibility for the development of Long's relationship with JG on Wilkens. This is the testimony of a conspirator only to the extent that the conspirator is seeking to put the rap on a co-conspirator. This is not, however, how the testimony played out, as Sherer's words eloquently state:

> I hazard to think what it would have been like for me in that agency had I done that without the support of any supervisor. For a long time, months, in my agency, my supervisor, day in and day out, was literally sometimes the only person who spoke to me, because our child welfare division as a whole, the people that found about about this from Becky, were so angered that this happened to poor Becky, that violated these policies (Tr. at 152-153).

How Sherer or Wilkens became isolated from workers who supported Long after conspiring to assist Long can not be accounted for by a conclusion that they acted as surrogates for Long's adoptive interests. They can, however, be accounted for by a conclusion that they ultimately had to bring Long's relationship with JG to light when it became apparent the relationship had transgressed appropriate bounds.

In sum, the evidence will not support a conclusion that Sherer acted in a conspiratorial fashion to advance Long's adoptive interests to the detriment of JG's. Rather, the evidence shows that Sherer and Wilkens placed JG in the best available care facility in June of 1999, and hoped that the placement could lead to adoption. This cannot be said to be anything other than the appropriate exercise of judgement.

This cannot, however, account for the full complexity of the evidence on this point. It

is undisputed that Sherer and Wilkens agreed on a placement in which Fenrich was not the only adoptive possibility. Sherer and Wilkens both testified that they understood and supported the policies underlying Policy 96-2. Both understood that Long hoped to adopt JG, and intended to cultivate a relationship with her. Each became uneasy with that relationship, although at different points. It is apparent that each understood the placement posed a potentially delicate situation.

In spite of this, by mid-December of 1999, the TPR proceeding that affected JG's future became subject to a voluntary dismissal due to the absence of documentation of Long's relationship with JG. That relationship had grown, in all probability, to include overnight stays at the residence of a potentially adopting parent, whom JG referred to as if a parent. The Investigation's Conclusions that point to a conspiracy may overstate the evidence, but they do not overstate the precarious position the County had become boxed into.

The Union asserts that Sherer acted as a whistle-blower, and exposed the relationship to her own detriment. The strength of the Union's position against the investigation is that it oversimplified the process by which the relationship developed. This becomes the weakness of the Union's assertion on this point. The assertion that Sherer acted as a whistle-blower seeks to make this case into one of clear right versus wrong. Placing fault on Wilkens ignores that it is the credibility of her testimony that weakens the County's assertion of conspiracy-like actions on Sherer's and Wilkens' part. Wilkens' testimony indicates more than Sherer's will acknowledge that Fenrich accepted placement of JG to advance Long's adoptive interests. The credibility of Wilkens' testimony on other points makes this hard to ignore. In any event, it is apparent from Sherer's testimony standing alone that she was concerned about Long's relationship with JG virtually from the beginning.

The evidence thus establishes that Sherer was concerned about the propriety of the developing relationship of Long and JG. That JG's file was silent on this point is ultimately a departmental responsibility, but the assertion that Sherer played no meaningful role in that silence is not well founded. Whether Long accurately portrayed an understanding between herself and Howe in August of 1999 is unclear, since Sherer took no action to question it. Whatever knowledge of departmental supervisors had of the relationship between JG and Long cannot obscure that Sherer took no action to discuss her concerns with Howe, Siebecker or any member of the Corporation Counsel's Office. Nor does the evidence indicate she acted to document her concerns to JG's file.

The County's assertion that Sherer participated in a conspiracy to benefit Long ultimately fails because the evidence indicates that Sherer acted in JG's interests rather than Long's. The defense that Sherer could do nothing beyond what she did due to chain of command issues fails because the persuasive force in the defense of her actions rests on the advancement of JG's interests, not on DHS chain of command interests. Without regard to the statutory significance of the term, to be a "whistle-blower" in a position of fundamental responsibility such as hers would demand action on her part consistent with JG's interests. Whether or not she had to upset

the chain of command to advance her concerns is less significant than whether she took effective

action on JG's behalf. The silence of the file on the developing relationship between JG and Long does not manifest such action.

In sum, the County has a disciplinary interest in the conduct of DHS employees that obscured a relationship between JG and Long, which ultimately grew to the point that it jeopardized the TPR and JG's placement in the Fenrich Foster Home. The evidence will not support a conclusion that Sherer acted to hide that relationship. Nor will the evidence support a conclusion that she acted, prior to December of 1999, in a fashion that could effectively bring her concern with the relationship into the open.

VI.

The facts posed by the grievance are unprecedented. Long's involvement in the placement that prompted Policy 96-2 did not result in discipline. Thus, there is no historical record against which to determine the "evenhandedness" of the County's imposition of discipline. The discipline imposed reflects the degrees of culpability stated in the Investigation. Wilkens and Sherer received significant suspensions, placing them on the threshold of discharge. This reflects the County's assessment of the significance of their participation in a conspiracy of omission or commission to bend the placement process in favor of Long's interest in adopting JG. Wilkens' role as supervisor dictated to the County a harsher level of discipline. The discipline, standing alone, cannot be faulted as discriminatory. This, conclusion, however, begs the question whether the degree of culpability found by the investigation has been proven.

VII.

The discipline will not withstand scrutiny under this standard. As noted above, the discipline is rooted in the Investigation's determination that Wilkens and Sherer acted on Long's behalf to the detriment of JG's interests. This was, under Article 8, a situation demanding immediate suspension or discharge. The length of the suspension makes it evident that she stood on the threshold of discharge. This is an appropriate, if not lenient, sanction for the alleged conduct. Not surprisingly, Wilkens' and Sherer's testimony candidly acknowledge this. Wilkens noted the penalty "could have been worse . . . (i)n regards to what the County believes took place" (Tr. at 96). When confronted with the 2-23-00 memo, Sherer feared for her job.

As noted above, however, this level of conduct is unproven. The evidence does not support the existence of misrepresentation, nor does it support a conclusion Sherer acted on or after JG's placement in the Fenrich Foster Home in a fashion designed to skew the adoptive process in Long's favor. Beyond this, Bodnar and Thomas testified that Sherer's work history, which spans twenty-one years, is exemplary. Under this standard these considerations must be accounted for in assessing the propriety of the discipline.

More significantly, Article 8 specifies the normal course of discipline and starts that

process at "written reprimands" except "in situations calling for immediate suspension or discharge." The allegations that support immediate suspension are unproven. Thus, the County's disciplinary interest must start with a written reprimand.

The Award entered below makes Sherer whole for wages and benefits lost due to the suspension, expunges her file of references to the suspension and permits the County to enter a written reprimand.

Before closing, some discussion of the reprimand is appropriate, at least in my view. The remedy does not demand a wake up call to an unreceptive employee. Sherer has an exemplary, long-term record. The issues posed in this case are difficult and subtle. Discipline is typically neither. The purpose of a reprimand is to counsel. The basis of the reprimand is the silence of the file on Long's relationship to JG. The significance of the reprimand is not to inflict sufficient pain to wake Sherer up. That has no basis in the evidence, and is demeaning on both ends of the disciplinary process. To counsel, the reprimand should clarify, with the benefit of the investigation and hindsight, how DHS management believes Sherer could have effectively acted. From at least my perspective, the counsel should specify what she failed to do, when she failed to do it and how she should have responded. If she should have discussed her concerns with Siebecker and Howe after her conversation with Long in August of 1999, the reprimand should say so. If the County believes she should have spoken with personnel other than Wilkens, the reprimand should specify when and to what person(s) she should have spoken. If the County believes she should have documented her concerns to the file, the reprimand should specify when, to whom and in what form she should have done so. The silence of the file regarding the improper relationship is a departmental issue, and the reprimand should specify Sherer's individual responsibility to address it.

AWARD

The County violated Articles 1 and 8 of the Labor Agreement when it suspended Virginia Sherer for three days for not properly performing her duties as a Placement Coordinator and providing false information to others involved in this case.

As the remedy appropriate for the County's violation of the just cause requirement of Articles 1 and 8, the County shall expunge from Virginia Sherer's personnel file(s) any reference to her three-day suspension from work on March 1 through March 3, 2000. In addition, the County shall make Virginia Sherer whole by compensating her for the difference

in wages and benefits she received for the period from March 1 through March 3, 2000 and the wages and benefits she would have earned for that period but for the suspension. The County may, however, amend her personnel file(s) to reflect the issuance of a written reprimand.

Dated at Madison, Wisconsin, this 28th day of June, 2001.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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